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**ACCEPTED**  
4/25/05 8:18  
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TELEPHONE 252-3300  
TELECOPIER 256-8062

April 25, 2005

\*ALSO ADMITTED IN TX  
\*\*ALSO ADMITTED IN VA

**VIA HAND DELIVERY**  
**AND ELECTRONIC MAIL**

The Honorable Charles L.A. Terreni  
Chief Clerk/Administrator  
**Public Service Commission of South Carolina**  
Post Office Drawer 11649  
Columbia, South Carolina 29211

SO FOR  
COMMISSION  
2005 APR 25 PM 12:22  
REV 1000

RE: Application of Carolina Water Service, Inc. for adjustment of rates and charges for the provision of water and sewer service and modification of rate schedules; Docket No. 2004-357-WS

Dear Mr. Terreni:

Enclosed for filing please find the original and five (5) copies of the motion of Carolina Water Service, Inc. ("CWS") to prohibit the introduction of the testimony of DHEC witness Jeffrey P. DeBessonnet into the record or, alternatively, to prohibit its admission into evidence, in the above-referenced matter.

As the motion reflects, it is based upon the grounds that DHEC did not timely serve its pre-filed testimony on the Applicant in this case and that the allowance of this testimony will deny the Applicant, its customers and the other parties of record due process. **Given the nature of the within motion, CWS respectfully requests that a special meeting of the Commission be convened to address this motion not later than 24 hours after notice of same may be posted in accordance with R. 103-815 (Supp. 2004) and S.C. Code Ann. § 30-4-80(a) (1991).**

I would note that the Commission already has a night hearing scheduled in this docket for Tuesday, April 26, 2005. If the within motion cannot be considered and ruled upon prior to or at that time, the Applicant respectfully requests that it be granted an additional day, or until April 28, 2005, within which to file conditional rebuttal testimony responsive to DHEC's proposed testimony. Such an extension has heretofore been granted by the Commission in instances where DHEC has not been

(Continued . . .)

The Honorable Charles L.A. Terreni

April 25, 2005

Page 2

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able to timely pre-file testimony<sup>1</sup> and Applicant submits that, under the circumstances, it should be permitted an extension if the within motion cannot be decided before April 27, 2005.

By copy of this letter, I am serving counsel for all parties of record with a copy of same and enclose a certificate of service to that effect. I would appreciate your acknowledging receipt of this letter and the attached document by date-stamping the extra copy that is enclosed and returning it to me in the envelope provided.

If you have any questions or if you need any additional information, please do not hesitate to contact us.

Sincerely,

**WILLOUGHBY & HOEFER, P.A.**



John M.S. Hoefer

JMSH/twb

Enclosures

cc: C. Lessie Hammonds, Esquire  
Florence P. Belser, Esquire  
Jessica J.O. King, Esquire  
Carlisle Roberts, Jr., Esquire  
Scott Elliott, Esquire  
Charles Cook, Esquire  
(All via U.S. Mail, email and fax)

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<sup>1</sup>See Order No. 2002-133, Docket No. 2001-504-E, February 27, 2002 (applicant granted extension of time to pre-file rebuttal testimony where DHEC granted extension to pre-file testimony).

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2004-357-W/S**

SC PUBLIC  
SERVICE  
COMMISSION  
2005 APR 25 PM 12:22  
FILED

IN RE:

Application of Carolina Water Service,  
Inc. for adjustment of rates and charges  
and modification of certain terms and  
conditions for the provision of water and  
sewer service.

**MOTION FOR ORDER PROHIBITING  
INTRODUCTION OR ADMISSION OF  
TESTIMONY**

Applicant, Carolina Water Service, Inc., ("Applicant" or "CWS"), pursuant to S.C. Code Ann. Regs. R. 103-840 (1976), hereby moves for an order prohibiting the introduction of the direct testimony of Jeffrey P. deBessonnet, submitted on behalf of the South Carolina Department of Health and Environmental Control ("DHEC"), into evidence in the above-captioned proceeding. Alternatively, the Applicant moves for an order precluding the admission of said testimony into the record in this case. In support thereof, Applicant would respectfully show as follows:

1. DHEC was required, under 26 S.C. Code Ann. Regs. 103-869.C (Supp. 2004), to pre-file with this Commission, and serve all parties, any testimony it wished to give in the instant docket on or before April 20, 2005. In accordance with the notice issued February 3, 2005 by the Executive Assistant to the Commissioners, such pre-filing and service was permitted to be accomplished by mail.

2. Applicant is unaware of whether DHEC timely pre-filed the testimony of its proposed witness with the Commission's Docketing Department<sup>1</sup> or whether it timely served the other parties of record by mail on April 20, 2005. Applicant was not, however, served with a copy of such

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<sup>1</sup>Applicant is informed and believes that DHEC sent its pre-filed testimony to the Commission's Docketing Department via inter-agency mail. The Applicant questions whether that conforms to February 3, 2005 directive permitting filing by postal service or hand delivery.

testimony by mail on April 20, 2005. To the contrary, although DHEC has filed a certificate of service stating that it served Applicant by delivery to the undersigned counsel for Applicant via first class mail on April 20, 2005, that certificate is inaccurate. Attached hereto and incorporated herein by reference is a copy of the envelope in which DHEC served Applicant with a copy of the proposed testimony of its witness. As said envelope reflects, it was not deposited in the United States Mail until April 21, 2005. Moreover, same was not received in the office of the undersigned counsel for Applicant until April 22, 2005.

3. In Docket No. 2001-504-E, the Commission issued its Order No. 2002-133 issued February 27, 2002. At page 7 of that order, the Commission held as follows:

DHEC is hereby notified that this Commission, in the future, will not tolerate DHEC disobeying the Commission's Rules of Practice and Procedure and applicable State law.

Subsequently, in its Order No. 2002-167, issued March 7, 2002 in Docket No. 2001-504-E, the Commission precluded DHEC from presenting the pre-filed testimony of a DHEC witness because DHEC had failed to timely serve the applicant in that case with a copy of the testimony. Neither Order No. 2002-133 nor Order No. 2002-167 was appealed by DHEC and therefore these orders became the law of the case. *See Ross v. Medical University of S.C.*, 328 S.C. 51, 492 S.E.2d 62 (1997).

5. The Commission's orders have the force and effect of law. *S.C. Cable Television Association v. Southern Bell*, 308 S.C. 216, 417 S.E.2d 586 (1992). Moreover, the provisions of the Commission's Rules of Practice and Procedure specifically authorize the Commission to establish testimony pre-filing and service deadlines to be adhered to by parties of record. *See* R. 103-869.C, *supra*.

6. DHEC's failure to timely serve Applicant with the proposed testimony of its witness is in the instant docket is therefore a violation of the Commission's Rules of Practice and Procedure and state law.

7. In light of the Commission's admonishment that further transgressions of Commission rules and state law by DHEC will not be tolerated, Applicant submits that the only appropriate remedy is that DHEC be denied the right to present the testimony of its proposed witness in this case. The right of the other parties of record to have DHEC comply with the same laws, rules and orders binding upon them cannot be ignored without violating the equal protection and due process rights of such other parties. Additionally, even if Order No. 2002-133 is not the law of the case with respect to DHEC's obligation to comply with the Commission's Rules of Practice and Procedure, there is no basis upon which the Commission can justify a departure from its prior precedent on this very point involving this very agency which was established in Order No. 2002-167. *See 330 Concord Street Neighborhood Association v. Campsen*, 309 S.C. 514, 424 S.E.2d 538 (Ct. App. 1992) (holding that an administrative agency may not act arbitrarily in failing to follow its established precedent).

8. Applicant submits that the relief sought hereby is within the inherent power of the Commission to control the procedures employed in cases before it. Moreover, relief of the nature sought herein is available in matters in the courts of this state when a party fails to cooperate in discovery. See Rule 37(b)(2)(B) SCRCF. Accordingly, the same sanction is available to this Commission. See S.C. Code Ann. § 1-23-330(1) (2005). Applicant submits that the pre-filing of testimony under the Commission's rules is a procedure akin to discovery since it informs the parties,

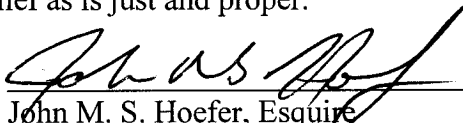
in a timely manner prior to hearing, of the nature of another party's case. Accordingly, the testimony of DHEC's witness should be prohibited from being introduced in the instant case.

9. Alternatively, even assuming that DHEC had timely filed its proposed testimony, same should not be admitted into the record of evidence in the instant docket. The Commission has already determined in its Order No. 2005-113 in the instant docket that the scope of this case is not to be expanded to include an examination of the pass-through provision of the Company's rate schedule. Yet the testimony of DHEC's proposed witness addresses that very issue. In addition to intentionally contravening the Commission's express ruling on this point, DHEC's effort to achieve the same effect of its motion through testimony, if permitted to succeed, would deny the Applicant, its customers, and the parties of record of due process. As the Commission correctly noted in Order No. 2005-113, the proposal of DHEC to expand the scope of the instant case to examine the pass-through provision would clearly have a potential impact upon CWS's customers. *Id.* at 3-4. This is so because, by its very nature, the effect of the action proposed by DHEC would be a redistribution of the Company's revenue requirement among customers in a manner that is inconsistent with that sought under the proposed rate schedule noticed in this case. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *See S.C. DSS v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995). An adjustment to the Company's rate schedule, without having notice of same having been given to the Company's customers, is inconsistent with S.C. Const. art. I, § 22. *See Porter v. S.C. Public Service Comm'n.*, 338 S.C. 164, 525 S.E.2d. 866 (2000). If DHEC were to be permitted to introduce the testimony of its proposed witness on the issue of the pass-through provision in the Company's at this stage, neither the

Company, its customers, nor the other parties of record will have been given notice and an opportunity to be heard consistent with due process.<sup>2</sup>

10. In further support of this motion, Applicant incorporates by reference its March 4, 2005 Answer in Opposition to DHEC's petition to intervene in, and motion to expand the scope of, the instant case.

WHEREFORE, having fully set forth its motion, Applicant requests that the Commission (1) issue its order denying DHEC the right to introduce the testimony of its proposed witnesses in this case, (2) alternatively, denying DHEC the right to have same admitted into the record in this case and (3) granting Applicant such other and further relief as is just and proper.

  
John M. S. Hoefer, Esquire  
**WILLOUGHBY & HOEFER, P.A.**  
Post Office Box 8416  
Columbia, South Carolina 29202-8416  
803-252-3300  
Attorneys for Applicant

Columbia, South Carolina  
This 25<sup>th</sup> day of April, 2005

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<sup>2</sup>The Company may file conditional rebuttal testimony in this matter to protect its position on the record on the merits of DHEC's proposal to eliminate the pass-through provision if same can be developed on or before the pre-filing deadline of April 27, 2005. However, even if the Company is able to do so, it will still not have received due process. As the Applicant in this case, the Company should be permitted to address any issue that will be considered pertaining to its proposed rate schedule in both its direct and rebuttal testimony. In light of the Commission's ruling in Order No. 2005-113, and DHEC's failure to seek immediate review of same as permitted under S.C. Code Ann. § 1-23-380(A), the Company reasonably believed that any further consideration of the issue DHEC now seeks to address in testimony would be made in the context of a petition for judicial review of the denial of DHEC's motion to expand the scope of this proceeding. DHEC's effort to now submit testimony on this point consigns the Applicant to addressing the issue only by way of rebuttal testimony which must be filed with less notice than required by the Commission's rules pertaining to pre-filing of rebuttal testimony. The Applicant submits that this denies it due process since its opportunity to be heard on the point would not be provided at a meaningful time nor in a meaningful manner. *See S.C. DSS v. Holden, supra.*



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Columbia, SC 29201

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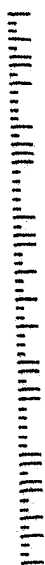


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**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2004-357-W/S**

RECEIVED  
2005 APR 25 PM 12:23  
SC PUBLIC SERVICE  
COMMISSION

IN RE:

Application of Carolina Water Service,  
Inc. for adjustment of rates and charges  
and modification of certain terms and  
conditions for the provision of water and  
sewer service.

**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day one (1) copy of **Motion for Order Prohibiting Introduction or Admission of Testimony** via facsimile, e-mail and by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

C. Lessie Hammonds, Esquire  
**Office of Regulatory Staff**  
Post Office Box 11263  
Columbia, South Carolina 29211  
Fax #: 737-0801  
[lhammon@regstaff.sc.gov](mailto:lhammon@regstaff.sc.gov)

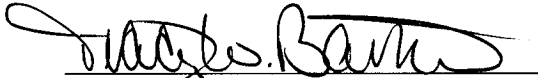
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[ccook@elliottlaw.us](mailto:ccook@elliottlaw.us)

  
Tracy W. Barnes

Columbia, South Carolina  
This 25<sup>th</sup> day of April, 2005.